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NOTE AND COMMENT

DEEDS DELIVERED CONDITIONALLY TO THE GRANTEE.—Generally courts have shown a commendable disposition to get away from the formalism which in the past played such a large part in determination of questions of delivery. While the actual tradition of the instrument to the grantee or to someone on his behalf, on the one hand, or its retention in the hands of the maker, on the other, is still very important evidentially, such facts are not by any means controlling. Thus it is entirely possible for a deed to be delivered though it never has been out of the grantor's hands; likewise a deed may be undelivered though in the hands of the grantee by the voluntary act of the grantor. See the discussion by Professor Tiffany in 17 MICH. L. REV. 104, *et seq.*, citing many cases. This result has come from the growing appreciation by the courts that delivery after all is simply the manifestation of the grantor's intent that, as to him, the instrument is a completed legal act. This intent is normally shown by a handing over of the deed to the grantee or to someone for him, but there are other ways of showing such intent. A deed in the hands of the grantor *prima facie* has been delivered; if in the hands of the grantor, *prima facie*, it has not been delivered.

It is, however, remarkable that in certain types of cases there is adherence to the old, formalistic idea that the conclusions referred to above as *prima facie* are conclusive. This is especially striking in those cases where a deed is handed to the grantee to become final and operative only on the happening of an event or the performance of some condition. In *Whyddon's Case,* Cro. Eliz. 520, decided in 1596 by the Court of Common Pleas, and in *Williams* v. *Green,* Cro. Eliz. 884, by the same court in 1602, it was held that "the delivery of a deed cannot be averred to be to the party himself as an escrow." The contrary was held by the Queen's Bench in 1601 in *Hawksland* v. *Gatchel,* Cro. Eliz. 835. While it cannot be said that the English courts have repudiated *Whyddon's Case,* there are reasons for thinking that when the question comes up squarely for decision the doctrine of *Hawksland* v. *Gatchel* will be followed. See *Murray* v. *Earl of Stair,* 2 B. & C. 82; *Watkins* v. *Nash,* L. R. 20 Eq. 262; *London Freehold & Leasehold Property Co.* v. *Suffield,* (1897) 2 Ch. 608.

In this country the courts very generally have approved of *Whyddon's Case,* even the most recent decisions. *Weber* v. *Christen,* 121 Ill. 91; *Wilson* v. *Jenks,* 63 Ind. App. 615; *Wipfler* v. *Wipfler,* 153 Mich. 18; *Hamlin* v. *Hamlin,* 192 N. Y. 164; *Chaudoir* v. *Witt,* (Wis. 1919) 174 N. W. 925. The reasoning underlying these holdings, when any is disclosed by the opinion, is shown by the following from the opinion of Gray, J. in *Hamlin* v. *Hamlin, supra*: "If we should give full effect to the plaintiff's claim, it would be to hold the delivery by her of the deeds to have been conditioned and not absolute; but that would be violative of the settled rule in this state that a delivery cannot be made to the grantee conditionally. Any oral condition accompanying the delivery, in such case, would be repugnant to the terms of the deed and parol evidence to prove that there was such a condition attached to the delivery is inadmissible. The reason for the rule applies to every case where the delivery is intended to give effect to a deed without the further act of the grantor and such was this case * * * These deeds had passed out of the plaintiff's possession and into that of the grantee, by the deliberate act of the former, and no oral condition, at the time, will be admitted to contradict the import of the written instruments." In short, the trouble is, as these courts view it, that the admission of parol evidence to show the condition is to violate the parol evidence rule.

In his celebrated work on Evidence Dean Wigmore has pointed out with characteristic clearness the true nature of the so-called Parol Evidence Rule. 4 WIGMORE ON EVIDENCE, § 2400, *et seq.* The matter here under consideration involves that part of the Rule dealing with the "enaction, or creation, of the act." Parol evidence is almost invariably admissible to show that no legal act has been consummated. Ibid. § 2408. In *Curry* v. *Colburn,* 99 Wis. 319, it was held that a grantor could show that his deed, which was complete on its face, had been handed to the grantee only for the purpose of taking it to an attorney for examination. See, too, *Sample* v. *Greathard,* 281 Ill. 79. Yet both these courts hold that a grantor will not be permitted to show by parol that a deed handed to the grantee was to become operative only on the

happening of an event. In *Wilson* v. *Powers,* 131 Mass. 539, in an action on a promissory note it was held permissible to show that the note had been handed to the payee to take effect only on the performance of a condition. Devens, J., said: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled in order to avoid its effect." In truth it seems that with reference to instruments other than deeds of conveyance such facts may be proved. See *Pym* v. *Campbell,* 6 E. & B. 370; 4 WIGMORE ON EVIDENCE, § 2410. There seems to be here a striking instance of a survival of a formalistic doctrine (explained by the relation between delivery of deeds of conveyance and primitive modes of conveyance) regarding which English courts have shown a more enlightened view than have courts on this side. Indeed this is characteristic of the attitudes of the courts in the two countries regarding the law of Real Property, generally.

Reference should be made to *Lee* v. *Richmond,* 90 Iowa 696, where the rule of *Whyddon's Case* was not applied. R. W. A.

LIABILITY WITHOUT FAULT.—In *Ives* v. *South Buffalo Ry. Co.,* 201 N. Y. 271, appeared, as a basis for the decision, the statement that "When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law." Mr. Justice McKenna has recently voiced the same idea. In his dissenting opinion in *Arizona Copper Co.* v. *Hammer,* 39 Sup. Ct. Rep. 553, he contends that the Workmen's Compensation Act of Arizona is unconstitutional, because, "It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault." Even the majority of the court seemed inclined to justify their decision, that the Act was constitutional, by the argument that, as the liability under it would be known in advance, employers could protect themselves by "reducing wages and increasing the selling price of the product, in order to allow for the statutory liability."

The fallacy of this proposition, as a principle of the Common Law, has been several times pointed out. One type of case, however, in which liability without fault not only exists, but is constantly being enlarged, seems to have been ignored. By the Common Law there is imposed upon sellers of goods, in certain instances, a liability of which they are not notified and which has no relation whatever to fault or free will on their part.

These are the cases in which sellers of goods are held to be absolute insurers of the harmlessness thereof. In *Parks* v. *Yost Pie Co.,* 93 Kan. 334, for instance, the plaintiff had been poisoned by some deleterious substance in a pie which he had bought from a retail dealer. There was no privity of contract with the defendant, but the latter, as a manufacturer, had made the pie and sold it to the intermediate dealer. The action for damages was in tort. There was absolutely no evidence of fault on the defendant's part even offered, beyond the facts stated. Nevertheless, the court held that the